Supreme Court, U.S.
FILED

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No. _____

SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1996

SHAWN ANTHONY SEVERA,

Petitioner

vs.

THE UNITED STATES OF AMERICA,

Respondent

On Petition For Writ Of Certiorari

To The United States Court of Appeals
For the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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February 13, 1997

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QUESTIONS PRESENTED

1. Did the Court of Appeals violate Petitioner's constitutional rights to due process and a fair trial by affirming a 132 month sentence and a felony conviction where the jury's verdict, as a matter of law, found Severa guilty only of "TRANSPORTING MARIHUANA", a misdemeanor with a maximum sentence of 12 months?

2. Did the Court of Appeals violate Petitioner's constitutional rights to due process and a fair trial on the grand jury's indictment by affirming a felony conviction where the jury's verdict, as a matter of law, constituted the plain error of a fatal constructive amendment to the indicted offense and variance from that necessary for conviction under the district court's instructions?

PARTIES BELOW

This case's caption contains all parties' names to the proceedings in the court below of whose judgment review is sought.

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SUPREME COURT OF THE UNITED STATES

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SHAWN ANTHONY SEVERA, Petitioner

vs.

THE UNITED STATES OF AMERICA, Respondent

On Petition For Writ Of Certiorari
To The United States Court of Appeals
For the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

TO THE SUPREME COURT:

Petitioner, Shawn Anthony Severa (Severa), respectfully petitions the Court to issue a writ of certiorari to review the judgment of the U.S. Court of Appeals for the Fifth Circuit.

OPINION AND ORDERS BELOW

The unpublished opinion of the Court of Appeals is copied in the Appendix at 1-6. The unpublished judgment of the U.S. district court is copied in the Appendix at 9-21.

JURISDICTION

The Court of Appeals issued its opinion on October 8, 1996. On November 15, 1996, the Court of Appeals denied as a petition for panel rehearing Severa's timely suggestion for rehearing in banc. That appellate rehearing order is copied in the Appendix at 7-8. Thus, this petition was timely filed on February 13, 1997. See Supreme Court Rule 13. The jurisdiction of the Supreme Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISIONS

The Fifth Amendment in part reads:

> No person shall be held to answer for a capital, or

> otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, ... nor shall any person be ... deprived of life, liberty, or property, without due process of law ....

The Sixth Amendment in part reads:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, ... and to have the assistance of counsel for his defence.

STATEMENT OF THE CASE

In the southern district of Texas's Laredo division, the U.S. district court had jurisdiction under 18 U.S.C. 3231 because on June 5, 1995, Severa was indicted on three counts for offenses against federal laws. On August 22, 1995, a superseding indictment (Appendix at 22-24) was returned in criminal case no. L-95-115-S, charging Severa with conspiracy in violation of 21 U.S.C. 846, 841(a)(1) and 841(b)(1)(B) (count one); aiding and

abetting possession with intent to distribute over 100 kilograms, that is, 2115.25 pounds (gross weight), of marihuana in violation of 21 U.S.C. 841(a)(1) and 841(b)(1)(B) and 18 U.S.C. 2 (count two); and knowingly carrying a firearm during and in relation to a drug-trafficking crime in violation of 18 U.S.C. 924(c)(1) (count three).

On August 23, 1995, a jury trial commenced after the district court granted the government's motion to dismiss count one of the superseding indictment. On August 25, 1995, the jury found Severa not guilty as to count three and as to count two, the jury's written verdict (Appendix at 25) read, "GUILTY CHARGE #2 TRANSPORTING MARIHUANA".

On December 21, 1995, the district court (Kazen, J.) sentenced Severa to a term of 132 months in the custody of the

U.S. Bureau of Prisons and assessed a term of five years supervised release, a fine of $1,500 and a special assessment of $50 (Appendix 9-21).

In this criminal case, the district court entered its judgment on December 28, 1995 (Appendix at 9-21). On December 21, 1995, Severa timely filed notice of appeal of his judgment of conviction and sentence, thereby vesting the Court of Appeals with jurisdiction under 28 U.S.C. 1291 and 18 U.S.C. 3742.

REASONS FOR GRANTING PETITION

First, it was plain error for the district court to award Severa a 132 month sentence when 12 months is the maximum legislated sentence available after the jury's written verdict (Appendix at 25) found Severa "GUILTY CHARGE #2 TRANSPORTING MARIHUANA", a misdemeanor.

Second, it was plain error after judicial and prosecution prodding about "transporting marihuana", for the jury to constructively amend the indictment by its jury verdict which convicted on count two of "transporting marihuana" without finding that possession was with intent to distribute, an element necessary for conviction.

FACTS

This case involves the transportation of marihuana through the Border Patrol checkpoint on IH-35 approximately fifteen (15) miles north of Laredo, Texas (R. at 97-99). At the checkpoint, officers searched the trailer Severa had been driving and discovered marihuana secreted in the trailer's roof (R. at 103-105).

Severa was the owner of the tractor (R. at 241, 244), which had a paper plate registered to William Hodges of Houston,

Texas (R. at 167, 170). That trailer was one of several trailers sold to Sociedad de Produccion Rural del Soconosko, a Mexican company (R. at 249).

Severa was one of several drivers that had transported the trailers from Trail Mobile, Inc., in Dallas, Texas to Hidalgo, Texas before they were to be shipped later to a Mexican corporation (R. at 274-276, 282-283).

D.E.A. case agent Colin McNeese testified Severa had said he was hauling the trailer for William Hodges to Hockley, near Houston, Texas; and Severa could not make a controlled delivery that day (a Friday) because he was not scheduled to deliver the trailer until Monday (R. at 273, 464).

Severa testified. His business was an independent operation known as Scarlett Trucking Company (R. at 195-197). Larry

Flint hired him to haul the trailers (R. at 332-342, 303-355, 386). Severa did not know the trailer had marihuana in the roof; he did not speed away; and he did not pass any vehicles before he got stopped (R. at 345-346). At the checkpoint, he explained Mr. Flint had hired him for the trip (R. at 353-354, 422-423; see also 273, 465). Severa told the agent he would cooperate in the trailer's controlled delivery as scheduled the following Monday, but the agent refused (R. at 422-423). Severa denied he knowingly possessed the marihuana (R. at 345-346).

ARGUMENT

Plain error exists in Severa's felony conviction and sentencing to 132 months in custody pursuant to 21 U.S.C. 841(a)(1) and 841(b)(1)(B). Under the jury's verdict, Severa should have been sentenced

to no more than the legislative maximum of one year in custody for simple possession by transporting under 21 U.S.C. 844. The higher sentence was a denial of a substantial right, which was not called to the district court's attention.

Severa's jury found Severa guilty of an offense necessarily included in the offense charged, thus unwittingly exercising the purpose of Rule 31(c) of the Federal Rules of Criminal Procedure. "'The purpose of this protection is to prevent juries from improperly resolving their doubts in favor of conviction when one or more of the elements of the charged offense remain unproven, but the defendant seems plainly guilty of some offense.'" U.S. v. Harrison, 55 F.3d 163, 166 (CA5 1995).

Severa submits that jury's verdict finding guilt of "transporting marihuana"

(without intent to distribute), was a result of a constructive amendment of the superseding indictment and constituted a fatal variance with the superseding indictment's count two charge of possession with intent to distribute in violation of 21 U.S.C. 841(a)(1), and 841(b)(1)(B).

Stirone v. U.S., 361 U.S. 212, 80 S.Ct. 270, 4 L.Ed.2d 252 (1960), held that at trial the charges contained in an indictment may not be broadened or altered through an implied or explicit amendment, except by the grand jury itself. Such constructive amendments, which are reversible error per se, occur when the jury is permitted to convict upon a factual basis different than an essential element of the offense charged. Id., at 217-218; U.S. v. Young, 730 F.2d 221, 223 (CA5 1984).

Although "possession of marihuana" is necessary to be able to transport that marihuana, "transporting marihuana" is not an offense to be found in the federal statutes.

U.S. v. Harrill, 877 F.2d 341, 344 (CA5 1989), held that a conviction based on an offense not charged in the indictment, including the enlargement of an indictment by instructions to the jury, breaches the Fifth Amendment guarantee of the U. S. Constitution that no one may be prosecuted for a felony except upon indictment by a grand jury.

In the present case the indictment was broadened, and a wrongful conviction allowed, by the prosecutor's consistent argument in opening and closing that Severa was charged with having transported the marihuana (R. at 81, l. 3-4; 517, l. 23-24). The district court also

contributed to the constructive amendment of the indictment by instructing the jury as follows:

> IT HAD A RELATIONSHIP TO COMMITTING A DRUG OFFENSE; THAT IT WAS THERE TO HELP PROTECT OR HELP MAKE SMOOTHER THE TRANSPORTATION OF NARCOTICS (R. at 545, l. 5-7). * * * * THE ONLY CHARGE AGAINST HIM, AT LEAST WITH RESPECT TO THE MARIJUANA, IS, DID HE KNOW... WHEN HE AGREED TO MOVE THE TRAILER FROM ONE POINT TO ANOTHER, DID HE KNOW THAT IN THAT TRAILER WAS AN ILLEGAL CARGO AND, THEREFORE, DID HE KNOWINGLY AGREE TO MOVE IT ON THE HIGHWAY WITH THE INTENT TO DELIVER IT TO SOMEBODY ELSE (R. at 547, l. 6- 12).

The ultimate proof on this issue is the fact that the jury's verdict found Severa guilty of "transporting marihuana" and not of possession with intent to distribute as charged in the indictment. By so finding, the jury in essence found Severa not guilty of count two as charged in the indictment and guilty of

"transporting marihuana", a lesser charge to that included in the indictment.

After jury deliberation, the district court received the jury's verdict and upon noticing that the phrase "GUILTY CHARGE # TWO TRANSPORTING MARIHUANA" had been written in by the jury foreman, asked only the foreman if he meant that as a finding of guilt in count two, to which the foreman replied "THAT'S CORRECT" (R. at 570, l. 10-17).

Thereafter all twelve jurors were polled individually each replying that it (the verdict as submitted) was their true and correct verdict. The jurors were then admonished and dismissed (R. at 571-575).

Severa's attorney, after the dismissal of the jury, asked to see the verdict form and questioned the validity of the verdict. The district court called for the jury, but not before one of

Severa's attorney had spoken with one of the jurors (R. at 576-578). Only eleven jurors appeared on the recall (R. at 580, l. 6) and the district court proceeded to poll the foreman. Mr. Cruz responded orally, and the other ten jurors responded by nodding (the court reporter assuming it was in the affirmative), that they discussed all the technical elements of possession with knowledge, of marihuana, with the intent to distribute (R. at 581).

Severa submits that the attempt by the district court to clarify the verdict was improper. A verdict is final if deliberations are over, the result is announced in open court, and the jury is polled and no dissent is registered. U.S. v. White, 972 F.2d 590 (CA5 1992).

The actions of the courtroom deputy clerk in file stamping the verdict form and docketing the verdict is immaterial to

the question of when a verdict is "recorded". When a poll is requested, the verdict becomes final and "recorded" when the twelfth juror's assent to that verdict is made on the record. U.S. v. Dakins, 872 F.2d 1061, 1065 (CA D.C. 1989). Where no poll is requested or taken, the verdict becomes final and unalterable and is "recorded" when the jury has dispersed, completing its discharge. U.S. v. Marineri, 32 F.3d 1209, 1213 (CA7 1994) The jury cannot further deliberate once the final verdict has been recorded. U.S. v. Straach, 987 F.2d 232, 242 (CA5 1993).

In the present case, the verdict of "GUILTY CHARGE # TWO TRANSPORTING MARIHUANA" had been recorded when, during polling, the 12th juror assented to that verdict. Invalid was the district court's subsequent attempt to resolve the ambiguity in the verdict by later

improperly re-polling only eleven jurors, after the court had first dispersed the jury and the jury had talked to other persons.

To allow Severa's conviction to stand on the re-polling of only eleven jurors after the verdict's recording constitutes a violation of Severa's fundamental right to a unanimous verdict. See U.S v. Moreno, 612 F.2d 483 (CA10 1979); U.S. v. Smedes, 760 F.2d 109 (CA6 1985); U.S. v. Essex, 734 F.2d 832 (CA D.C. 1984); and U.S. v. Ullch, 976 F.2d 509 (CA9 1992).

To question only the foreman, Severa submits was improper to clarify the ambiguity. Upon noticing the verdict was "at the very least ambiguous and/or a determination of guilt of a lesser offense and not guilty on the offense charged in count two," the proper procedure the district court should have followed was

not to question only the foreman as was done, but to instead permit the jury to resume deliberation and allow correction of its verdict before the re-reading of the verdict and final polling of the jury. See U.S. v. Mears, 614 F.2d 1175, 1179 (CA8 1980).

Severa also submits the unanimous jury's verdict of "GUILTY CHARGE # TWO TRANSPORTING MARIHUANA" cannot be treated as mere surplusage. Severa is aware of case law where additional comments on the verdict form have been treated as surplusage.

In U.S. v. Davis, 747 F.2d 440, 442 (CA8 1984), the comment "we the jury believe that Davis was used by the witnesses that testified against him", was treated as surplusage for it did not qualify the verdict or rendered it equivocal or ambiguous. Any uncertainty

as to the verdict was removed by the polling and each juror's response that Davis was guilty.

Cook v. U.S., 379 F.2d 966, 970 (CA5 1967), and cases cited therein, stand for the proposition that where the jury finds the defendant guilty as charged in the indictment and, without more, simply requests leniency, that request should be treated as surplusage. In Cook, however, the request for leniency was not a simple request but there was strong suggestion during the polling that there would have been no agreement as to the verdict unless the recommendation of leniency was also accepted. The effect of that recommendation, steadfastly adhered to during jury polling, was to nullify the verdict. In other words, there is no verdict as long as there is any uncertainty or contingency to the finality

of the jury's determination. Id., at 970.

Severa submits that his case can be distinguished from those in which the jury's comment was treated as surplusage. In Davis, supra, there was no uncertainty or contingency on the jury's determination of guilty on the offense charged in the indictment, and neither was the comment a condition on the finding of guilt as in Cook. In the present case however, the jury's comment "GUILTY CHARGE # TWO, TRANSPORTING MARIHUANA", renders the verdict vague, ambiguous, and uncertain in that transporting marihuana was not the offense charged and was a finding of guilty on a constructive amendment of the indictment invited by the prosecution and the district court. The polling of twelve jurors and subsequent re-polling of only eleven jurors did not resolve the ambiguity. The jury should have been

required to continue its deliberation before the verdict was officially recorded for the last time.

The jury's verdict and Severa's above reading of it should come as no surprise to either the government or the district court. Much of the juried trial of this case was about whether or not Severa knowingly transported marihuana. See examples below. In opening statement, the prosecutor said (R. at 517, l. 23-24): "HE'S JUST CHARGED WITH TRANSPORTING IT KNOWINGLY."

Without objection (R. at 555), the district court instructed the jury (R. at 533-534, l. 23-6, 19-22; 535, l. 21-25; 536, l. 14-24; 538, l. 16-24; 539, l. 23-224; 540, l. 9-10, 12-13; 545, l. 1-7; 547, l. 6-14):

> SO LET'S TALK ABOUT THE FIRST ONE, WHICH IS LABELED COUNT TWO. IT IS A CRIME TO KNOWINGLY AND INTENTIONALLY HAVE IN YOUR

POSSESSION CERTAIN CONTROLLED SUBSTANCES, AND MARIJUANA IS ONE OF THEM. I'LL INSTRUCT YOU THAT AS A MATTER OF LAW, MARIJUANA IS ONE OF THOSE SUBSTANCES WHICH COMES UNDER THIS PROVISION. IT IS A CRIME TO KNOWINGLY AND INTENTIONALLY BE IN POSSESSION OF MARIJUANA WITH THE INTENT TO TO DISTRIBUTE IT, AND THAT'S WHAT HE'S CHARGED WITH IN THIS COUNT NUMBER TWO. **** I MEAN, NOBODY IS DISPUTING THE EVIDENCE THAT, IN FACT, WHAT WAS IN THERE WAS MARIJUANA AND THERE IS NOT ANY REAL SERIOUS DISPUTE THAT THE GENTLEMAN WAS IN POSSESSION OF IT. **** SO THE IDEA HERE IS THAT YOU CAN FIND, UNDER THE LAW, THAT IF A GENTLEMAN IS THE SOLE OPERATOR AND INDEED THE OWNER OF THE TRUCK AND HE IS PULLING A TRACTOR AND IN THE TRACTOR IS MARIJUANA, THAT HE IS IN POSSESSION OF THE MARIJUANA. **** THERE'S TWO KINDS OF MARIJUANA VIOLATIONS. ONE IS WHAT WE CALL "SIMPLE POSSESSION", THAT YOU HAVE IT BUT YOUR INTENT IS SIMPLY TO TAKE IT HOME AND SMOKE IT. THAT'S WHAT'S CALLED "SIMPLE POSSESSION". THIS KIND OF POSSESSION, THAT HE'S CHARGED WITH, IS CALLED "AN INTENT TO DISTRIBUTE IT", AND THAT SIMPLY MEANS THAT THE GOVERNMENT IS ALLEGING THAT HE HAD THE INTENT NOT TO TAKE IT HOME TWO THOUSAND POUNDS FOR SMOKING IT BUT RATHER WAS INTENDING TO DISTRIBUTE IT. HE WAS INTENDING TO DELIVER IT

SOMEBODY ELSE. THAT'S ALL THAT MEANS. **** OF COURSE, THAT'S SOMETHING YOU CAN CONSIDER AS PART OF THE TOTAL PACKAGE, THAT HE WAS IN POSSESSION OF IT AND HE WAS THE DRIVER AND IT WAS HIS TRUCK AND SO FORTH, BUT THAT ALONE IS NOT ENOUGH. THE GOVERNMENT HAS TO GO BEYOND THAT AND SHOW THAT NOT ONLY WAS HE IN POSSESSION OF IT, BUT HE KNEW IT. AND THAT WHY ALL THE REST OF THIS INFORMATION, WHICH YOU MAY, AT TIMES, HAVE THOUGHT WAS STRANGE OR NOT STRANGE, BUT ALL THE REST OF THIS IS WHAT REALLY COMES DOWN TO IT. **** NOW, THE GOVERNMENT ONLY HAS TO PROVE THAT HE KNEW HE WAS CARRYING A CONTROLLED SUBSTANCE. **** IN FACT, THE POUNDAGE ITSELF IS NOT AN ELEMENT ... WAS THERE MARIJUANA AND WAS THERE A MEASURABLE AMOUNT. **** BUT THAT'S WHAT YOU HAVE TO DECIDE. IN OTHER WORDS, NOT ONLY WAS THERE A GUN THERE, NOT ONLY WAS HE CARRYING A GUN IN THE TRUCK AND NOT ONLY DID HE KNOW IT, BUT DID IT HAVE... DO YOU THINK IT PLAYED A PART IN... DO YOU THINK IT HAD A RELATIONSHIP TO COMMITTING A DRUG OFFENSE; THAT IT WAS THERE TO HELP PROTECT OR HELP MAKE SMOOTHER THE TRANSPORTATION OF NARCOTICS. **** SO THE ONLY CHARGE AGAINST HIM, AT LEAST WITH RESPECT TO THE MARIJUANA, IS, DID HE KNOW... WHEN HE AGREED TO MOVE THAT TRAILER FROM ONE POINT TO ANOTHER. DID HE KNOW THAT IN

> THAT TRAILER WAS AN ILLEGAL CARGO AND, THEREFORE, DID HE KNOWINGLY AGREE TO MOVE IT ON THE HIGHWAY WITH THE INTENT TO DELIVER IT TO SOMEBODY ELSE. SO YOU'RE NOT HERE TO JUDGE ANYBODY ELSE. ALL WE WANT IS YOUR VERDICT, EITHER WAY, AS YOU SEE FIT UNDER THESE INSTRUCTIONS AND UNDER THE EVIDENCE, ON THOSE TWO COUNTS FOR THIS DEFENDANT.

It is well settled that reversible error occurs when either the district court or the prosecution amend the grand jury's non- surplusage parts of the indictment during a trial. U.S. v. Doucet, 994 F.2d 169 (CA5 1993). After those various above described courtroom amendments so Severa was being also prosecuted herein for the lesser included offense of "knowing transportation of possessed marihuana, a controlled substance" in violation of 21 U.S.C. Sec. 844 (a), all this case's parties and the courts must accept the jury's compromised but rational verdict of "GUILTY CHARGE #2

TRANSPORTING MARIHUANA," rather than "guilty as charged" on Count 2 as suggested by the district court's verdict form and that court's other proper jury instructions (R. at 550, l. 11-19).

To support a simple possession conviction, the evidence must show knowing possession of a controlled substance. U.S. v. Steen, 55 F.3d 1022, 1030-1032 (CA5 1995). The district judge normally expressly instructs the jury that if it did not find defendant guilty of knowing possession with the intent to distribute, the jury could find guilt of the lesser included charge of simple possession. See U.S. v. Onick, 889 F.2d 1425, 1430-1433 (CA5 1989); U.S. v. Deisch, 20 F.2d 139 (CA5 1994).

CONCLUSION

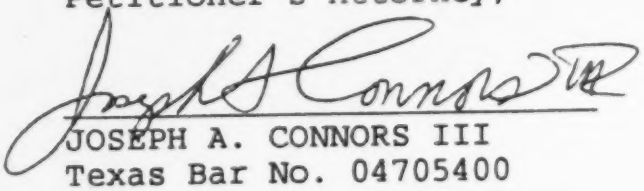
For the foregoing reasons, the Supreme Court should find plain error(s)

below which require the reversal of all judgments below and the remand of the cause to the district court for resentencing of Severa to no more than the one year statutory maximum under 21 U.S.C. Sec. 844 (a).

PRAYER

Severa prays a writ of certiorari issue.

Respectfully submitted by
Petitioner's Attorney,



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